In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-206

JACOB J. PARKER, ET AL., APPELLANTS

v.

HOWARD B. LEVY

No. 72-1713

SECRETARY OF THE NAVY, APPELLANT

v.

MARK AVRECH

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE APPELLANTS

I. *Parker v. Levy, No. 73-206.*

1. The appellants in this case appealed the holding of the United States Court of Appeals for the Third Circuit that Articles 133 and 134 of the Uniform Code of Military Justice, 10 U.S.C. 933 and 934, were unconstitutional. On February 12, 1974, Levy filed a 126 page brief raising numerous procedural, evidentiary and constitutional issues which fail outside the issue pre-

sented in the appeal. While the issues raised by Levy may, in fact, constitute alternative arguments for the affirmance of the judgment below, they were never passed upon by the court of appeals.

We respectfully suggest that if this Court finds Articles 133 and 134 to be constitutional, the case should be remanded to the court of appeals for consideration of the alternative arguments raised by Levy. This procedure has been explained by the Court in *United States* v. *Ballard,* 322 U.S. 78, 88, as follows:

> Respondents maintain that the reversal of the judgment of conviction was justified on other distinct grounds. The Circuit Court of Appeals did not reach those questions. Respondents may, of course, urge them here in support of the judgment of the Circuit Court of Appeals. *Langnes* v. *Green,* 282 U.S. 531, 538—539; *Story Parchment Co.* v. *Paterson Co.,* 282 U.S. 555, 560, 567-568. But since attention was centered on the issues which we have discussed, the remaining questions were not fully presented to this Court either in the briefs or oral argument. In view of these circumstances we deem it more appropriate to remand the cause to the Circuit Court of Appeals so that it may pass on the questions reserved. *Lutcher & Moore Lumber Co.* v. *Knight,* 217 U.S. 257, 267-268; *Brown* v. *Fletcher,* 237 U.S. 583. If any questions of importance survive and are presented here, we will then have the benefit of the views of the Circuit Court of Appeals. Until that additional consideration is had, we cannot be sure that it will be necessary to pass on any of the other constitutional issues which respondents claim to have reserved.

See also *Dandridge* v. *Williams*, 397 U.S. 471, 476, n. 6 ("When attention has been focused on other issues, or when the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court"); *Aetna Cas. & Sur. Co.* v. *Flowers*, 330 U.S. 464, 468.

2. Levy argues that "[t]he Government * * * seems to concede that Dr. Levy was not convicted for making 'public' statements" (Appellee Br., No. 73-206, p. 47). The government has made no such concession; indeed the record shows that Levy was convicted of "publicly utter[ing]" disloyal statements. Levy's argument that he might have been convicted for private statements because "the law officer deleted this element from his charge" (Appellee Br., No. 73-206, p. 47) misunderstands both the law officer's charge and the court's findings. The law officer charged that to find Levy guilty the court must find "beyond a reasonable doubt" that, *inter alia*, the statements were "Publicly made" (R. 2594). He then said (*ibid.*):

> If you are not convinced beyond a reasonable doubt that these statements, if any, were made in public, you may nevertheless find the accused guilty by excepting the words "in public" from your findings, provided, of course, you are convinced of his guilt beyond a reasonable doubt of the remaining elements.

The court returned a verdict of "Guilty," without excepting the words "in public" from its findings (R. 2617). It therefore found beyond a reasonable doubt that Levy was guilty, as charged in the specification, of "publicly utter[ing]" disloyal statements. See generally *Manual for Courts-Martial*, 1969 (Revised edition) Para. 74b.

II. *Secretary of the Navy v. Avrech, No. 72-713.*

1. Avrech argues that he may have been convicted of attempting to violate the second clause of Article 134 (prohibiting "all conduct of a nature to bring discredit upon the armed forces") because the specification did not in terms allege that his disloyal statements were "to the prejudice of good order and discipline," as provided in the first clause of the Article (Appellee Br., No. 72-1713, pp. 11, n.12, 12).[1] No records of the instructions given in *Avrech* exist today, so we cannot be sure that they did not include a reference to the second as well as the first clause. It seems clear, however, that Avrech was convicted of attempting to violate the first clause of Article 134.

In the first place the specification charged that Avrech attempted to publish his statements "to members of the Armed Forces of the United States * * * with design to promote disloyalty and disaffection among the troops" (App., No. 72-1713, p. 3). The convening authority in drafting the charge thus specifically avoided any mention of promoting disloyalty and disaffection among the "civilian populace," an alternative form of charge suggested in the model specification (see U.S. Br., No. 72-1713, p. 13a).

Avrech's attempted publication took place at Marble Mountain Air Facility, at Danang, in Vietnam, while he was on active duty in a combat zone. The intended recipients of his publication were, according to both the charge (*supra*) and Avrech's own testimony (Appellee Br., No. 72-1713, p. 5), other servicemen. Such conduct

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[1]We note that the specification against Levy did in terms charge that the disloyal statements were "to the prejudice of good order and discipline in the armed forces" (App., No. 73-206, p. 7).

does not fall within the service-discrediting clause, but rather is governed by the clause dealing with prejudice to good order and discipline. Thus in *United States* v. *Gray*, 20 U.S.C.M.A. 63, 67-68, 42 C.M.R. 255, 259-260, where the defendant was convicted of making a disloyal statement, the court made it clear that the service-discrediting provision did not apply: "Since the statement was published on a military reservation and only military persons were involved, the evidence must establish 'reasonably direct and palpable' prejudice to good order and discipline." This conclusion in *Gray* was based upon the holding of *United States* v. *Snyder*, 1 U.S.C.M.A. 423, 4 C.M.R. 15. In *Snyder* the court held that enticing a woman in the service to engage in sexual intercourse violated the first clause of Article 134. The court said (1 U.S.C.M.A. at 425, 4 C.M.R. at 17): "[S]ince the alleged misconduct transpired in the semi-privacy of a military reservation, the second [service-discrediting] category need not detain us at length." See also, *United States* v. *Kirksey*, 6 U.S.C.M.A. 556, 20 C.M.R. 272; *United States* v. *Cummins*, 9 U.S.C.M.A. 669, 26 C.M.R. 449.

2. Relying on *Stolte* v. *Laird*, 353 F. Supp. 1392 (D.D.C.), Avrech contends that the "disloyal statement specification is itself unconstitutionally vague and overly broad (Appellee Br., No. 72-1713 pp. 48-49, 53-63). In this connection Avrech asserts (Appellee Br., No. 72-1713, p. 48) that the Court of Military Appeals has "recently held that the requirement of 'direct and palpable' injury does not apply where a serviceman is charged with making disloyal statements." Contrary to this assertion, the military courts have continued to hold that the requirement of "direct and palpable" prejudice applies to disloyal statements, as well as all other offenses under the General Article. In *United*

States v. *Gray, supra,* and *United States* v. *Priest,* 21 U.S.C.M.A. 564, 45 C.M.R. 338 on which Avrech relies, the military court did not abandon the traditional requirements, but simply reaffirmed the rule that disloyal statements can directly and palpably prejudice good military order and discipline without successfully propagating disloyalty. *United States* v. *Batchelor,* U.S.C.M.A. 354, 22 C.M.R. 144. In accordance with these principles, the government must prove, *inter alia,* that the alleged statements had a clear and reasonable tendency to promote disloyalty and disaffection among the troops, and that such conduct was "directly and palpably" prejudicial to good order and discipline in the Armed Forces.[2]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

February 1974

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[2]In discussing the "disloyal statements" specification, Avrech suggests that the offense is a new one under the General Article, first added in the 1951 Manual (Appellee Br., No. 72-1713, pp. 25, 54). Such misconduct, however, has long been at the core of that Article's proscription. For example, Winthrop cites early cases construing the Article to forbid "[e]xpressing sentiments disloyal to government and in sympathy with the enemy." *Military Law and Precedents,* 728, n. 22 (2d ed., 1920).

No. 72-1713

Mar. 18, 1974 - Supplemental brief for appellant and supplemental brief for appellee, after argument, filed. NOT PRINTED.